INDUSTRIAL CONCRETE PRODUCTS BERHAD A

v.

HUANG KHAIRUN KUMAR & ASSOCIATES

B

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
ANANTHAM KASINATHER JCA
MAH WENG KWAI JCA
[CIVIL APPEAL NO: B-02-(NCVC)(W)-653-03-2013]
7 JANUARY 2014

C

LEGAL PROFESSION: *Remuneration - Professional fees - Claim for - Whether appellant appointed respondent as its exclusive agent - Whether respondent entitled to stipulated commission - Letter of appointment - Whether letter of appointment illegal - Whether solicitor could enter into arrangement with client whereby entitlement to fees was conditional on success - Legal Profession Act 1976, s. 112(1)(b) - Whether letter of appointment precluded appellant from appointing other persons to be its agents - Whether appellant at liberty to appoint other agents - Whether respondent discharged all obligations under letter of appointment*

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REVENUE LAW: *Sales tax - Refund - Recovery of erroneously paid sales tax - Proper procedure - Whether claim to be made to Director General of Customs under s. 32 Sales Tax Act 1972 within one year - Whether appeal to Minister of Finance to exercise power under s. 10 Sales Tax Act 1972 could only be made after claim to Customs Department gives no positive result - Whether overpayment or erroneous payment must be acknowledged by Customs Department before Minister of Finance can direct refund to individual - Whether s. 32 precedes s. 10 of Sales Tax Act 1972*

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The appellant appointed the respondent *vide* letter of appointment ('letter of appointment') to secure a refund of sales tax amounting to RM4,349,897.05 ('sales tax') allegedly erroneously paid by the appellant to the Royal Customs and Excise Department ('Customs Department'). The terms of the appointment *inter alia* included (i) that the appellant would pay the respondent a fee of RM1,087,474.20 "upon receiving refund of the said sum erroneously paid"; and (ii) that there shall be no fee payable if the refund was not successful. The respondent wrote three appeal letters to the Minister of Finance; the first two were rejected but

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on the third and last appeal *ie*, appeal letter dated 22 September 2005, the Deputy Minister of Finance wrote a notation addressed to the Director General of Customs to refund the sales tax erroneously paid. However, a letter dated 5 October 2005 from the Deputy Minister of Finance addressed to the Director General of Customs did not evoke any response from the Customs Department. The absence of any response for two years caused the appellant to appoint another firm of consultants, Top Tier Services Sdn Bhd ('Top Tier') to undertake the task of recovering the sales tax from the Customs Department. In response to Top Tier's letter dated 19 March 2007, the Customs Department formally acknowledged its fault in the collection of the sum of the sales tax from the appellant and advised the appellant to appeal to the Minister of Finance. The said response prompted the appellant to appoint Top Tier as its representative. The office of the Finance Ministry, by a letter dated 25 March 2008 addressed to the appellant and copied to Top Tier, refunded the erroneously paid sales tax. The respondent, upon discovering that the appellant had successfully obtained a refund of the erroneously paid sales tax, issued a letter of demand for the professional fees promised by the appellant in its letter of appointment. The appellant argued that it had never appointed the respondent as its exclusive agent for dealing with the Customs Department and that it was through the efforts of Top Tier that the appellant was able to recover the erroneously paid sales tax and as such, the commission had been rightfully paid by the appellant to Top Tier. The respondent submitted that it was entitled to the commission promised under the letter of appointment since the respondent had discharged the obligations imposed upon it under the terms of the letter of appointment. The High Court allowed the respondent's claim for the full amount of the promised commission in the letter of appointment. Hence, the appellant appealed.

Held (allowing appeal with costs)
Per Anantham Kasinather JCA delivering the judgment of the court:

(1) According to the terms of the letter of appointment, the respondent was entitled to the stipulated commission only in the event of the appellant being able to recover the erroneously paid sales tax. According to s. 112(1)(b) of the Legal Profession Act 1976, a solicitor cannot enter into an arrangement with a client whereby his entitlement to fees was conditional on him being successful. Since the respondent was

a firm of solicitors and the services undertaken by them pursuant to the letter of appointment was contentious in nature, it followed that this letter of appointment was illegal. A court of law can consider and rule on the legality of a contract at any stage of the proceedings and of its own volition. (para 13)

(2) The proper procedure for the recovery of the erroneously paid sales tax was for the claim to be made to the Director General of Customs under s. 32 Sales Tax Act 1972 within one year of the overpayment or erroneous payment and not the Minister of Finance. The appeal to the Minister to exercise his power under s. 10 Sales Tax Act 1972 should only be made after the claim to the Customs Department had been made under s. 32 without any positive result. The Minister may then determine from the Customs Department whether there has indeed been an overpayment or erroneous payment of sales tax. It is when such overpayment or erroneous payment is acknowledged by the Customs Department that the Minister of Finance can 'direct' the refund to the particular individual who had overpaid or erroneously paid the sales tax. Section 32 precedes s. 10 and consequently the appeal lodged by the respondent with the Ministry of Finance was not undertaken in accordance with its obligations under the terms of its letter of appointment. (para 16)

(3) The letter from the Customs Department dated 17 August 2007 which contained its approval of the appellant's appeal had merely required the appellant to appeal for the payment by way of refund of the erroneously paid sales tax to the Minister of Finance pursuant to s. 10(a) and (b) of the Sales Tax Act 1972 based on its determination as to the appellant's entitlement to the refund. This was why all the three letters of appeal lodged by the respondent with the Minister of Finance failed to evoke a satisfactory response over the period of six years. The respondent had failed to address the letter of appeal in a timely manner to the Customs Department pursuant to s. 32 of the Act. The trial judge erred in ruling that the respondent had discharged all the obligations under the letter of appointment. (para 17)

(4) The trial judge failed to appreciate that the terms of the respondent's letter of appointment did not preclude the appellant from appointing other persons to be its agents to pursue the recovery of the erroneous payment. The appellant was at liberty to appoint Top Tier to be its agents for the recovery of the erroneous payment. The trial judge erred in making adverse findings against the appellant arising from their appointment of Top Tier solely because the appointment was effected without prior notice to the respondent. (para 18)

Bahasa Malaysia *Translation Of Headnotes*

Perayu melantik responden melalui surat pelantikan ('surat pelantikan') untuk mendapatkan pembayaran balik cukai jualan berjumlah RM4,349,897.05 ('cukai jualan') yang didakwa tersilap dibayar oleh perayu kepada Jabatan Kastam dan Eksais Diraja Malaysia ('Jabatan Kastam'). Syarat-syarat pelantikan, antara lain, termasuk (i) perayu akan membayar responden fi sebanyak RM1,087,474.20 "apabila menerima bayaran balik jumlah wang yang tersilap dibayar tersebut"; dan (ii) tiada bayaran fi yang kena dibayar jika bayaran balik tidak berjaya diperolehi. Responden menulis tiga surat rayuan kepada Kementerian Kewangan; surat pertama dan kedua telah ditolak tetapi pada surat ketiga dan rayuan terakhir, iaitu surat rayuan bertarikh 22 September 2005, Timbalan Menteri Kewangan menulis satu catatan yang dialamatkan kepada Ketua Pengarah Kastam untuk mendapatkan bayaran balik cukai jualan yang tersilap dibayar. Walau bagaimanapun, surat bertarikh 5 Oktober 2005 dari Timbalan Menteri Kewangan tidak membangkitkan sebarang jawapan daripada Jabatan Kastam. Oleh kerana tiada tindak balas selama dua tahun, perayu telah melantik firma perunding yang lain, Top Tier Services Sdn Bhd ('Top Tier') untuk menjalankan tugas mendapatkan balik cukai jualan daripada Jabatan Kastam. Sebagai tindak balas kepada surat Top Tier bertarikh 19 Mac 2007, Jabatan Kastam telah dengan rasminya mengakui kesalahannya dalam mengutip jumlah cukai jualan tersebut daripada perayu dan menasihatkan perayu untuk membuat rayuan kepada Menteri Kewangan. Tindak balas tersebut telah mendorong perayu untuk melantik Top Tier sebagai wakilnya. Pejabat Menteri Kewangan melalui surat bertarikh 25 Mac 2008 yang dialamatkan kepada perayu dan dibuat salinan kepada Top Tier telah mengembalikan cukai jualan yang telah tersilap dibayar. Responden, apabila mengetahui bahawa perayu telah berjaya

memperolehi bayaran balik cukai jualan tersebut, mengeluarkan surat tuntutan untuk bayaran profesional yang telah dijanjikan oleh perayu dalam surat pelantikannya. Perayu berhujah bahawa ia tidak melantik responden sebagai ejen eksklusif dalam urusannya dengan Jabatan Kastam dan bahawa ia adalah melalui usaha Top Tier yang perayu berjaya mendapatkan balik bayaran cukai jualan yang telah tersilap dibayar dan dengan itu, komisen telah dengan betulnya dibayar kepada Top Tier. Responden berhujah bahawa ia berhak ke atas komisen yang telah dijanjikan dalam surat pelantikan kerana responden telah melaksanakan kewajipan-kewajipan yang telah dikenakan ke atasnya di bawah syarat-syarat surat pelantikan. Mahkamah Tinggi membenarkan tuntutan responden untuk jumlah sepenuhnya komisen yang telah dijanjikan dalam surat pelantikan. Oleh itu, perayu merayu.

Held (membenarkan rayuan dengan kos)
Oleh Anantham Kasinather HMR menyampaikan penghakiman mahkamah):

(1) Menurut syarat-syarat surat pelantikan, responden berhak untuk mendapatkan komisen yang telah ditetapkan hanya sekiranya perayu berjaya mendapatkan balik cukai jualan yang telah tersilap dibayar. Menurut s. 112(1)(b) Akta Profesion Undang-Undang 1976, seorang peguam tidak boleh memasuki satu perjanjian di mana haknya ke atas bayaran fi adalah bersyarat ke atas kejayaannya. Oleh kerana responden adalah sebuah firma peguam dan perkhidmatan yang dijalankan oleh mereka menurut surat pelantikan adalah bersifat kontroversial, oleh itu surat pelantikan adalah tak sah. Mahkamah undang-undang boleh mempertimbangkan dan memutuskan kesahihan kontrak di mana-mana peringkat prosiding dan mengikut kehendaknya.

(2) Prosedur yang betul bagi mendapatkan balik cukai jualan yang tersilap dibayar adalah untuk tuntutan dibuat kepada Ketua Pengarah Kastam di bawah s. 32 Akta Cukai Jualan 1972 dalam tempoh satu tahun daripada berlakunya pembayaran lebih atau kesilapan bayaran dan bukan kepada Menteri Kewangan. Rayuan kepada Menteri untuk melaksanakan kuasanya di bawah s. 10 Akta Cukai Jualan 1972 hanya patut dibuat selepas tuntutan kepada Jabatan Kastam telah dilaksanakan di bawah s. 32 tanpa membawa apa-apa keputusan positif. Menteri kemudiannya boleh menentukan

daripada Jabatan Kastam sama ada terdapat bayaran lebih atau silap bayaran cukai jualan. Hanya apabila bayaran lebih atau silap bayaran diakui oleh Jabatan Kastam yang Menteri Kewangan boleh "mengarahkan" bayaran balik kepada individu tertentu yang telah membuat bayaran lebih atau tersilap bayar cukai jualan. Seksyen 32 mendahului s. 10 dan akibatnya rayuan yang dibuat oleh responden dengan Kementerian Kewangan tidak dilaksanakan mengikut kewajipan yang terdapat dalam syarat-syarat surat pelantikan.

(3) Surat daripada Jabatan Kastam bertarikh 17 Ogos 2007 yang mengandungi kelulusan rayuan perayu hanya memerlukan perayu untuk membuat rayuan untuk bayaran dengan mendapatkan balik cukai jualan yang telah tersilap bayar kepada Menteri Kewangan menurut s. 10(a) dan (b) Akta Cukai Jualan 1972 berdasarkan keputusan berkenaan hak perayu ke atas bayaran balik itu. Ini adalah sebab mengapa ketiga-tiga surat rayuan yang dikemukakan oleh responden kepada Menteri Kewangan gagal membangkitkan tindak balas yang memuaskan dalam tempoh enam tahun. Responden gagal untuk menangani surat rayuan tepat pada masanya kepada Jabatan Kastam menurut s. 32 Akta. Hakim bicara telah khilaf dalam memutuskan bahawa responden telah melaksanakan segala kewajipan di bawah surat pelantikan.

(4) Hakim bicara telah gagal untuk menghargai bahawa syarat-syarat yang terdapat dalam surat pelantikan responden tidak menghalang perayu dari melantik pihak lain untuk menjadi ejennya dalam meneruskan perolehan semula bayaran yang telah silap dibayar. Perayu bebas untuk melantik Top Tier menjadi ejennya bagi mendapatkan balik bayaran yang telah silap dibayar. Hakim bicara telah gagal dalam membuat dapatan bertentangan terhadap perayu berbangkit dari tindakan mereka melantik Top Tier hanya kerana pelantikan dilaksanakan tanpa pemberian notis terlebih dahulu kepada responden.

Case(s) referred to:

Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd [1999] 1 CLJ 89 CA ***(dist)***

Mustafa Osman v. Lee Chua (P) [1996] 3 CLJ 494 CA ***(refd)***

Pembinaan Perwira Harta Sdn Bhd v. Letrikon Jaya Bina Sdn Bhd [2013] 2 CLJ 437 FC ***(dist)***

Legislation referred to:
Legal Profession Act 1976, s. 112(1)(b)
Rules of the Court of Appeal 1994, r. 18(2)
Sales Tax Act 1972, ss. 10(a), (b), 32

For the appellant - Shanti Mogan (Denise Tan & Lau Weng Ann with her); M/s WA Lau & Partners
For the respondent - Sri Dev Nair (Mahinderjit Singh, Nurzafirah Mat Ani & V Kumaresan with him); M/s Huang Khairun Kumar & Assocs

[Appeal from High Court, Shah Alam; Civil Suit No: 22-NCVC-1263-11-2011]

Reported by Suhainah Wahiduddin

JUDGMENT

Anantham Kasinather JCA:

Background Facts

[1] The appellant appointed the respondent *vide* letter dated 10 May 2000 to secure a refund of sales tax amounting to RM4,349,897.05 ("sales tax") allegedly erroneously paid by the appellant to the royal customs and excise department ("customs department"). The terms of the appointment *inter alia* included the following:

(i) The appellant would pay the respondent a fee of RM1,087,474.20 "upon receiving refund of the said sum of sale tax erroneously paid"; and

(ii) "There shall be no fee payable if the refund is not successful".

[2] Pursuant to the aforesaid letter of appointment, the respondent had written three appeal letters to the Minister of Finance on 7 June 2000, 7 March 2005 and 22 September 2005. The first two letters of appeal were rejected by the Minister of Finance. On the third and last appeal letter ie, appeal letter dated 22 September 2005, the "Timbalan Menteri Kewangan" wrote an instruction/notation addressed to the Director General of Customs to refund the sales tax erroneously paid by the appellant, if they are entitled to it.

[3] The respondent treated the notation of the Timbalan Menteri Kewangan as amounting to an approval and sought to retrieve the original receipts for the payments effected by the appellant. Pursuant to the written request of the respondent for the aforesaid original receipts, the appellant duly released the receipts to the respondent on 26 September 2005. It is not clear from the evidence as to how the respondent dealt with the original receipts but the letter of 5 October 2005 from the office of the Timbalan Menteri Kewangan addressed to the Ketua Pengarah Kastam dan Eksais makes reference to the inclusion of unspecified documents.

[4] The letter of 5 October 2005 from the office of the Timbalan Menteri Kewangan did not evoke any response from the customs department. The absence of any response for almost two years caused the appellant to appoint another firm of consultants namely Top Tier Services Sdn Bhd ("Top Tier") in March 2007 to undertake the task of recovering the sales tax from the customs department.

[5] Following their appointment, Top Tier caused to be written a letter dated 19 March 2007 to the Ketua Pengarah Kastam for the refund of the erroneously paid sales tax by the appellant. The customs department responded to Top Tier's letter with the reply dated 17 August 2007. In this reply the customs department formally acknowledged its fault in the collection of the sum of RM4,349,897.05 from the appellant and advised the appellant to appeal to the Minister of Finance for the refund of the aforesaid sum of money. The response from the customs department prompted the appellant to appoint Top Tier as its representative, this time for the appeal to the Minister of Finance and duly notified the Ministry of Finance of their appointment of Top Tier *vide* its letter of 5 September 2007. The office of the Kementerian Kewangan Malaysia by a letter dated 25 March 2008 addressed to the appellant and copied to Top Tier refunded the erroneously paid sales tax of RM4,349,897.05 together with the penalty of RM2,174,948.51.

[6] According to the respondent, it came to know about the appellant having successfully obtained a refund of the erroneously paid sales tax in the year 2008, during the course of a conversation between one of its representatives and an officer in

the customs department. This caused the respondent to issue a letter of demand for the professional fees promised by the appellant in its letter of appointment *vide* its letter of 1 November 2011.

[7] Upon the refusal of the appellant to acknowledge the claim of the respondent, the respondent caused a writ to be issued for the recovery of its profesional fees.

Appellant's Case

[8] The appellant's case can be said to be twofold. The first is that there is nothing in the letter appointing the respondent as its sole representative for the recovery of the erroneously paid sales tax from the customs department. In other words, that the appellant had never appointed the respondent as its exclusive agent for dealing with the customs department. For this reason, learned counsel for the appellant submitted that the appellant was clearly at liberty to appoint Top Tier as its second agent to deal with the customs department and the Ministry of Finance. This submission was put forward to essentially rebut the submission of learned counsel for the respondent that the appellant had appointed Top Tier surreptitiously and solely to deprive the respondent of the commission promised to it under its letter of appointment. Secondly, learned counsel for the appellant submitted that there was overwhelming evidence that it was through the efforts of Top Tier that the appellant was able to recover the erroneously paid sales tax. As such, the commission had been rightfully paid by the appellant to Top Tier.

Respondent's Case

[9] Learned counsel for the respondent submitted that the learned trial judge had rightly concluded that the respondent was entitled to the commission promised under the letter of appointment since the respondent had discharged the obligations imposed upon it under the terms of the letter of appointment. The learned trial judge recognised the three letters written by the respondent on behalf of the appellant to the Minister of Finance as amounting to the discharge of its obligations under the terms of its letter of appointment. Learned counsel for the respondent also relied on the notation contained in the letter of 22 September 2005 in the handwriting of an officer of the Ministry of Finance

to the effect that the customs department should refund the sales tax if erroneously paid by the appellant. This notation coupled with the fact that Top Tier never wrote a letter of appeal to the Minister of Finance, according to the learned counsel for the respondent, meant that the appeal was allowed by the Minister of Finance pursuant to the respondent's letter of appeal since, in those circumstances, the respondent's letter was the only letter of appeal. In this respect, learned counsel for the respondent submitted that it must be borne in mind that there was no time frame for the consideration of the appeal by the Minister of Finance.

[10] Learned counsel for the respondent then cited the decision of the Federal Court in the case of *Pembinaan Perwira Harta Sdn Bhd v. Letrikon Jaya Bina Sdn Bhd* [2013] 2 CLJ 437 as authority for the proposition that one party to a contract is precluded from preventing the other from performing and completing the contract. With respect, this proposition of law was presumably cited by learned counsel for the respondent in support of his submission that the appellant had appointed Top Tier surreptitiously shortly after the Minister of Finance had allowed the respondent's appeal as evidenced by the notation in the respondent's letter of 22 September 2005 with the view to preventing the respondent "from concluding the last obligation to get the refund from the customs department" (to use the words in para. 15 of the written submission of counsel for the respondent).

Judgment Of The High Court

[11] The learned judge of the High Court premised his judgment in favour of the respondent on the following findings of fact:

(a) That the respondent by writing the final letter of appeal dated 22 September 2005 had discharged all of its obligations for the recovery of the erroneously paid sales tax under the terms of its letter of appointment (see para. 18 of the Alasan Penghakiman);

(b) Although some six years had lapsed without much progress in the appeal, the respondent had kept the appellant informed of the progress in the appeal and the appellant had not instructed the respondent of the need for it to undertake any other steps (see para. 19 of the Alasan Penghakiman);

(c) The surreptitious appointment of Top Tier coupled with the fact that the only appeal to the Minister of Finance had been lodged by the respondent, must mean that the approval granted by the Minister of Finance was pursuant to the letter of appeal originating from the respondent (see paras. 20 and 21 of the Alasan Penghakiman); and

(d) Although the appeal pursued by the respondent on behalf of the appellant had been outstanding for six years, the fact of the matter is that the respondent was appointed first in point of time and Top Tier had merely relied on the earlier services performed by the respondent in securing the refund (see paras. 23 and 24 of the Alasan Penghakiman)

[12] Based on the aforesaid findings of fact and the proposition of law in the case of *Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd* [1999] 1 CLJ 89; [1999] 1 MLJ 65, His Lordship allowed the claim of the respondent for the full amount of the promised commission in the letter of appointment.

Decision Of The Court

[13] In our judgment, the letter of appointment of 10 May 2000 is an illegal agreement. We opine to this effect because according to the terms of the letter of appointment, the respondent is entitled to the stipulated commission only in the event of the appellant being able to recover the erroneously paid sales tax. As is evident from para. 1 of this judgment, one of the terms of the letter of appointment was that "There shall be no fee payable if the refund is not successful". According to s. 112(1)(b) of the Legal Profession Act 1976, a solicitor cannot enter into an arrangement with a client whereby his entitlement to fees is conditional on him being successful. Since the respondent his a firm of solicitors and the services undertaken by them pursuant to the letter of appointment is contentious in nature, in our judgment, it follows that this letter of appointment is illegal. We are conscious that the issue of illegality was not raised by the appellant nor included in their memorandum of appeal. Be that as it may, in our opinion, we are not precluded from allowing this appeal on the grounds of illegality since a court of law can consider and rule on the legality of a contract at any stage of the proceedings and of its own volition (see the case of *Mustafa Osman v. Lee Chua (P)* [1996] 3 CLJ 494; [1996] 2 MLJ 141).

The prohibition in r. 18(2) of the Rules of the Court of Appeal 1994 against the parties to the appeal raising a ground of appeal not included in the memorandum does not extend to the court hearing the appeal. This is clear from the second part of r. 18(2).

[14] Notwithstanding our ruling that the letter of appointment constitutes an illegal contract thereby compelling us to allow this appeal, we propose in this judgment to deal with the merits of appeal since substantial arguments were addressed to us on the merits of appeal. We observed that the thrust of the judgment of the learned judge of the High Court appears to be that the respondent was entitled to the commission because it is the only party who lodged a proper appeal with the Minister of Finance. The rationale for this conclusion being that, Top Tier had only written a letter of appeal to the customs department and its letter to the Minister of Finance did not take the form of a letter of appeal but more in the form of a request for the refund of the erroneously paid sales tax.

[15] The procedure to be followed in the recovery of erroneously paid sales tax is regulated by ss. 10 and 32 of the Sales Tax Act 1972. The respondent had caused to be written to the Minister of Finance three letters of appeal pursuant to s. 10 of the Act but none directly to the customs department. The Minister of Finance after rejecting the first two letters of appeal provided by way of a notation addressed to the customs department, in the third letter of appeal of 22 September 2005 that the customs department should order the refund, if the appellant was entitled to the refund. Top Tier, on the other hand, following its appointment by the appellant immediately addressed the letter of appeal of 19 March 2007 to the customs department. The letter from Top Tier to the customs department evoked a fairly prompt response from the customs department in that by its letter of 17 August 2007, it allowed the appeal and requested that the appeal for the refund be directed to the Minister of Finance.

[16] In our judgment, it is clear from a reading of ss. 10 and 32 of the Sales Tax Act 1972 that the proper procedure for the recovery of the erroneously paid sales tax is for the claim to be made to the Director General of Customs under s. 32 within one year of the overpayment or erroneous payment and not the Minister of Finance. The interpretation of the language used in these two sections makes this clear. Section 32 provides for the

Director General of the Customs "to order the refund of the money so overpaid or erroneously paid". Section 10 of the same Act, on the other hand, authorises the Minister of Finance to "direct the refund to any persons or class of persons of the whole or any part of the sales tax paid by such person or such class of person". In our view, the appeal to the minister to exercise his power under s. 10 should only be made after the claim to the customs department has been made under s. 32 without any positive result. The minister may then determine from the customs department whether there has indeed been an overpayment or erroneous payment of sales tax. It is when such overpayment or erroneous payment is acknowledged by the customs department that the Minister of Finance can "direct" the refund to the particular individual who had overpaid or erroneously paid the sales tax. In other words, s. 32 precedes s. 10 and consequently the appeal lodged by the respondent with the Ministry of Finance was not undertaken in accordance with its obligations under the terms of its letter of appointment.

[17] Indeed, the facts of this case amply demonstrate that the conduct of the customs department and the Ministry of Finance is consistent with the interpretation accorded by us as regards the interplay of the two sections. We opine to this effect because the Minister of Finance after rejecting the first two letters of appeal from the respondent, addressed the respondent's third appeal letter of 22 September 2005 to the customs department with the notation that it was for them to rule on the entitlement of the appellant to the refund. In other words, the Ministry of Finance acknowledged that it was in no position to order any refund pursuant to s. 10 until it was in receipt of a confirmation from the customs department pertaining to the appellant's entitlement to such refund. This order of priority in the operation of the aforesaid two sections, is reinforced by the contents of the letter from the customs department of 17 August 2007 containing its approval of the appellant's appeal. The customs department in this letter merely required the appellant to appeal for the payment by way of refund ("pembayaran balik cukai") of the erroneously paid sales tax to the Minister of Finance pursuant to ss. 10(a) and (b) of the Sales Tax Act 1972 based on its determination as to the appellant's entitlement to the refund. In our judgment, this explains the reason why all the three letters of appeal lodged by the respondent with the Minister of Finance failed to evoke a satisfactory response over the period of six years. Viewed in this

context, with respect, the learned trial judge, in our judgment, erred in ruling that the respondent had discharged all the obligations under the letter of appointment. The fact of the matter is that the respondent failed to address the letter of appeal in a timely manner to the customs department pursuant to the s. 32 of the Act.

[18] In our judgment, there is yet another ground upon which this appeal should be allowed. That is this. In the ultimate analysis, the learned trial judge found as a fact that it is the respondent's efforts that resulted in the refund of the erroneous payment. His Lordship's finding was that Top Tier had essentially relied upon the earlier letter of appeal authored by the respondent and addressed to the Minister of Finance that caused the minister to refund the erroneous payment. In our judgment, this finding of the learned trial judge failed to take into consideration several facts other than the construction placed by us on the interplay between ss. 10 and 32 of the Sales Tax Act 1972. First, His Lordship failed to realise that the respondent's first two letters of appeal were rejected by the Minister of Finance. The third letter although not rejected, nevertheless, recognised that the appeal should in the first instance be made to the customs department. There is no evidence of the respondent having lodged an appeal with the customs department in a timely manner on behalf of the appellant pursuant to s. 32 of the Sales Tax Act 1972. Secondly, His Lordship failed to appreciate that if the respondent was in constant communication with the customs department and simultaneously kept the appellant informed of the progress of the matter, a finding of the learned trial judge, then, how does the respondent account for not being aware until 2011 that the appeal lodged by Top Tier was allowed in 2008? In our judgment, the learned trial judge in coming to this finding of fact failed to appreciate that it is highly unlikely that the respondent would have waited for three years to file his claim if it genuinely came to know about the appeal being allowed as early as 2008, as claimed by it (see pp. 84 and 85 of Rayuan Tambahan II). In our opinion, it is more likely that the respondent only became aware of the appeal being allowed some time before the filing of the writ and this must necessarily imply that the respondent ceased pursuing the appeal on behalf of the appellant after failing to evoke a satisfactory response following the third appeal of 22 September 2005. Thirdly, the learned trial judge failed to appreciate that the

terms of the respondent's letter of appointment did not preclude the appellant from appointing other persons to be its agents to pursue the recovery of the erroneous payment. As such upon the respondent refusing to return the original receipts to the appellant (see p. 121 of Rekod Rayuan Tambahan II), the appellant was at liberty, in our view, to appoint Top Tier to be its agents for the recovery of the erroneous payment. With respect, in our view, the learned trial judge erred in making adverse findings against the appellant arising from their appointment of Top Tier solely because the appointment was effected without prior notice to the respondent. In our judgment, having regard to the non-exclusive nature of the appointment of the respondent and its refusal to surrender the original receipts, the conduct of the appellant does not warrant such a finding of fact. In this respect, the principle of law pronounced by the Court of Appeal in the case of *Hock Kuat Iron Foundary (Suing As a Firm) v. Naga Tembaga Sdn Bhd* (*supra*) is not applicable to the facts of this case since the appointment of the respondent was non-exclusive. Finally, to the extent that Top Tier addressed the appeal to the proper party under the law to receive an appeal of this nature, unlike the appeal lodged by the respondent with the Minister of Finance, neither the appellant nor Top Tier can be accused of having obstructed the respondent from succeeding in the appeal lodged by it, thereby rendering the proposition of law pronounced in the Federal Court case of *Pembinaan Perwira Harta Sdn Bhd v. Letrikon Jaya Bina Sdn Bhd* (*supra*) to be irrelevant.

[19] We are conscious that an appellate court should not lightly interfere with the findings of fact of a trial judge. However, with respect, we are constrained to rule for the reasons contained in this judgment that the learned trial judge had erred in a manner which warrants appellate intervention. Accordingly, we allowed the appeal with costs. We set aside the order of the learned trial judge of the High Court and ordered the respondent to pay costs of RM30,000 as costs here and below to the respondent. The deposit is refunded to the appellant.